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all and that it should be eliminated, at least for all customers served by voice-grade loops. As the Notice recognizes (*id.*) and as the *UNE Remand Order* found, a switching carve-out is appropriate *only* where a competing carrier is not impaired in providing services with its own switch. But these comments and the extensive record amassed over the last two years show that the carve-out is arbitrary and ignores the CLECs' actual market evidence that they cannot reasonably compete for any low-volume customer location, *i.e.*, those served by voice grade loops, without access to unbundled local switching and UNE-P. Given these impairments, any carve-out should apply only to locations that CLECs are reasonably able to serve with a DS-1 or higher capacity loop.

Because of the fact that *all* voice-grade loops are hard-wired to ILEC facilities, there is no need to examine, as the Notice suggests (§ 57), the "geographic component of the switch carve-out." Thus, there need be no geographic component to such a carve-out for DS-1 and higher level loops, provided that EELs are practically available without restriction. There is no basis to judge the impairment flowing from the switching carve-out by looking solely to the differences "between residences and businesses." Notice § 59. The hot cut and DLC problems associated with accessing customers' voice-grade loops and migrating them to CLEC switches apply to all customers served by such loops.

The "customer size" component of the current switching carve-out reasonably seeks to identify customers in the mass market, Notice § 59, but the "per-line" measure that the Commission adopted as a proxy for customer size is arbitrary, under-inclusive, and administratively complex.²²² Moreover, it has led to tedious disputes regarding the application

²²² This cannot be surprising, given the deficiencies in the administrative record that was before the Commission when it promulgated this aspect of the carve-out. See *UNE Remand Order*,
(continued . . .)

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of the switch carve-out, *see, e.g., See Fla. PSC Carve-Out Decision; Ga. PSC Carve-Out Decision*, and fails to include many business locations that properly should be considered within the mass market.²²³ Thus, as shown above, if any carve-out at all is applied, the more appropriate measure is the type of loop facility a CLEC uses to serve the customer location and that enables the competitor and its customers to avoid the hot cut and DLC problems. However, if the Commission wishes to continue to use a line count for a switching carve-out, it should be measured by a reasonable cross-over point between analog voice-grade and digital (DS-1) loops. As AT&T has previously shown, a line count of about 18 to 20 lines is the most appropriate proxy. Brenner Dec. ¶ 88; AT&T *Ex Parte*, CC Docket 96-98 (filed Oct. 11, 2000).

a. Switch counts mask impairment.

Some parties have suggested expanding the scope of the switching carve-out so that unbundled switching is generally unavailable, particularly in urban areas or for business customers. *Notice* ¶¶ 57-59. In support of these proposals, the proponents rely on market data purporting to show that CLECs currently have the capability to use their own switching to serve small and medium-sized business customers. In fact, however, these data are highly misleading

(... continued)

Separate Statement of Comm's Furchgott-Roth at 2. The Commission's carve-out attempts to distinguish between "mass-market" and larger business customers, but as AT&T has explained, the Commission's *UNE Remand Order* (¶ 291) effectively admitted that there was no record evidence to support the choice of three lines as the distinguishing factor between the mass market and larger customers. *See* AT&T Corp.'s Petition for Reconsideration and Clarification, at 13-17, CC Docket 96-98 (filed Feb. 17, 2000). Indeed, as these comments make clear, the mass market properly includes all customers served with voice-grade loops.

²²³ As one market research firm has concluded, the overwhelming majority of businesses with fewer than 100 employees and about half of businesses with 100 to 500 employees are served with voice-grade loops. Brenner Dec. ¶ 30.

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and do not demonstrate that new entrants can actually provide service to business customers that are served by voice-grade loops. *See* Brenner Dec. ¶¶ 89-93.

Some ILECs, for example, have proposed to restrict the availability of unbundled switching in areas where new entrants have deployed a specified number of switches. *E.g.*, Qwest *Ex Parte*, CC Docket 96-98 (filed Apr. 12, 2001) ; Verizon *Ex Parte*, CC Docket 96-98 (filed May 23, 2001); SBC *Ex Parte*, CC Docket 96-98 (filed July 23, 2001). But any rule that limits the availability of unbundled switching and UNE-P based on a simple count of new entrants' switches is arbitrary and fails to address the critical impairments resulting from the CLECs' inability to connect their switches to voice-grade loops.

Most fundamentally, use of mere switch counts as a trigger does not make the necessary inquiry into how CLECs are in fact using those switches or whether they are being utilized at efficient levels. *See* PACE *Ex Parte*, CC Docket 96-98 (filed May 1, 2001). A switch that cannot be used efficiently results in uneconomically high pre-unit switching costs, and does not enable a CLEC to offer broad-based local services – at least not for long. Leshner-Frontera Dec. ¶¶ 59-60; Brenner Dec. ¶ 78. A mere switch count thus ignores that CLECs cannot generate sufficient economies of scale in their switches to keep them in operation.²²⁴

Further, to the extent that CLECs are using their own switches, those switches are being used almost exclusively to provide service to large business locations. *See* UNE Remand Order

²²⁴ Moreover, the fact that *some* CLECs have deployed a switch in a particular location does not demonstrate that CLECs *generally* are able to self-provision a switch there or otherwise obtain switching capacity at that location that could substitute for the ILECs' unbundled local switching element. A CLEC cannot rely on another competing carrier's switch for the same reasons that the CLECs' own switches cannot be used to serve low-volume business locations: unlike the ILECs' switches, none of these CLEC switches have large numbers of customers' loops hard-wired to them, and there is no effective way to migrate such loops to *any* CLEC switch.

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¶ 255 & n.495. As noted above, even though AT&T has deployed more local switches than nearly all other CLECs, only about 3% of its voice grade equivalents consist of voice-grade loops connected to AT&T's switches. Brenner Dec. ¶ 23.²²⁵ Accordingly, a switch count would demonstrate that AT&T has deployed numerous switches but would ignore that AT&T's switches cannot feasibly be used to provide service to customers with voice-grade loops – the very loops affected by the limitation – and also are not utilized efficiently, making AT&T's switching costs significantly higher than the ILECs. *Id.* ¶¶ 90-91.

4. The Commission Cannot Reasonably Consider De-Listing Unbundled Local Switching until ILECs Implement an Automated Process to Provision Loops.

ILEC proposals to restrict or eliminate access to unbundled switching are also misguided because they each fail to address the underlying impairment that competing carriers face when they seek to use their own switches to serve customers served by voice-grade loops. Thus the Commission is clearly correct that it cannot reasonably consider eliminating the ILECs' obligation to unbundle local switching until the incumbents must have implemented an effective way to move such loops to competing carriers' switches. *See Notice* ¶ 59 (requesting comment

²²⁵ Most other CLECs have reported similar results: Birch Telecom, for example, explained to the Commission that it has purchased three switches that it initially intended to use to serve customers that used voice-grade loops. Birch Telecom *Ex Parte*, CC Docket 96-98, (filed Aug. 16, 2001); Birch Telecom *Ex Parte*, CC Docket 96-98 (filed July 19, 2001). However, its experiences with the hot cut process were "plagued with difficulty and delay," and forced it to halt those offerings. Instead, it uses its switches only to serve large business customers. *Id.* Likewise, Focal Communications uses its own switches to provide service, but it has informed the Commission that it "concentrates exclusively on customers that have a current need for DS-1 communications functionality or higher." Focal Communications Corp. *Ex Parte*, CC Docket 96-98 (filed May 19, 2000).

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on “whether incumbents that adopt a mechanized method of transferring loops to a competitive carrier’s switch should be excused from the obligation to provide unbundled switching”).

Notably, in the long distance market, all interexchange carriers have access to an electronic and automated system that allows customers to switch providers easily, at low cost, and with no service disruption. And critically, there are no inherent limits to the number of customers that can change providers, as is obviously the case with manual hot cuts. This is because the customer’s connection to its long distance provider is “software-defined,” meaning that the local switch serving a customer can be instructed via software to begin routing long distance calls to a different provider. This automated process was an essential prerequisite to today’s robustly competitive long distance market.

For the local market, there is also a technical solution that could result in the same type of automated and electronic processing of changes in a customer’s local service provider. If implemented, this process would eliminate the need for hot cuts and any other manual provisioning when a customer requests to change local service providers. This solution, which AT&T has called “electronic loop provisioning,” or ELP, uses existing loop facilities and customer premises equipment, but adds new technology that allows customers to switch local providers using a software-defined process, just as in the long distance market. Indeed, as described in Attachment G, the software-defined system in place in the long distance market was implemented as a result of equal access obligations, which required the Bell Operating Companies to add new facilities, additional software capabilities, and other improvements to network architecture – all of which were designed to create long distance competition. These changes are analogous in many respects to those needed to implement ELP. *See* Attachment G.

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As described in the attached declaration of Irwin Gerszberg, ELP deploys equipment that converts *all* of the customer's telecommunications services – both data and voice – into packets of data. Significantly, the ELP architecture is not a quantum change for the industry, but rather relies upon essentially the same technology that the incumbent LECs currently employ in their outside loop plant and central office. In particular, ELP would require changes to current equipment in three areas, but it would not require customers to make any changes to their existing CPE. First, the incumbent LEC's outside loop plant would be modified to deploy "true" next generation digital loop carriers that are equipped to packetize all the communications traffic over customers' existing copper distribution facilities. Gerszberg Dec. ¶¶ 22-24. All of the packetized traffic could be sent over a single fiber facility to the ILEC central office. *Id.* ¶ 24. Second, at the central office, the packetized traffic would be terminated on an ATM module, to which all carriers (including the incumbent) would connect to access the packetized traffic. *Id.* ¶¶ 25-28. Third, each carrier (including the incumbent) electing to provide circuit switched voice services would deploy a Voice over ATM (VoATM) gateway that would allow the packetized voice traffic to be sent over existing circuit switched networks. *Id.* ¶¶ 29-31.²²⁶ The equipment needed to implement the ELP architecture is currently available, and could be deployed today.

If ELP were implemented, the pro-competitive benefits would be significant. First, and most fundamentally, because the customers' communications would be packetized, a customer could change local providers with an automated process that is fast, accurate, and reliable. A

²²⁶ This preserves the ILECs' embedded circuit switched network without requiring other carriers to adopt the same platform.

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simple software change would instantaneously allow the customer's traffic to be routed to a new local provider, so that changes to a customer's local service provider could occur quickly, as in the long distance market, with virtually no service-related problems, and under conditions that would support mass-market entry. No hot cuts, physical rewiring or other physical changes to the plant or equipment would be necessary, eliminating the need for close coordination among carriers and manual work by technicians.²²⁷ Moreover, ELP allows competing carriers to access all types of voice-grade loops, even if they are served by DLC.

Further, although ELP entails new investment and modernizes the loop plant to support competitive availability of both the low and high frequencies of copper subloops, the ELP architecture would leverage the existing investments of consumers, the incumbent LEC and competing providers.²²⁸ And efficiencies in the ELP architecture – such as the use of a single fiber facility to connect the true NGDLC to the ATM module – will result in cost savings.²²⁹

Accordingly, given the major hurdles that switch-based CLECs face in attempting to access customers' voice-grade loops, the Commission should not even consider the possibility of de-listing local switching until there is a solution to these intractable obstacles. In particular, a

²²⁷ The ELP architecture also reduces the need for competitive LEC technicians to work collocation space in incumbent LEC offices, which has recently been flagged as a security concern by the incumbents.

²²⁸ The deployment of the facilities and equipment needed for ELP could also provide a significant economic benefit to the entire telecommunications industry by stimulating demand for new technology and equipment.

²²⁹ By contrast, the typical ILEC architecture for DSL-based services uses two separate facilities to carry communications from remote terminals to the central office: one to transport voice traffic and another for data and thus continues the DLC impairment for UNE-L access to provide voice-grade services.

solution like ELP, which allows customers served by any type of voice-grade loop to change local providers as easily as they can change long distance carriers, is essential to enable competing carriers to use their own switches to serve mass market customers.

D. The Commission Should Continue To Require ILECs To Provide Unbundled Access To Signaling Networks and Call-Related Databases.

The Commission must reaffirm that competitors would be impaired in their ability to offer telecommunications services without access to unbundled signaling networks and call-related databases whenever the CLEC is using the incumbent's unbundled switch.²³⁰ In the *UNE Remand Order*, the Commission recognized that "[c]urrent switch technology requires each local switch to connect to a single STP [signaling transfer point]." *UNE Remand Order* ¶ 386. Indeed, as the Commission noted, "[a]ll parties, including incumbent LECs, agree[d] that because the incumbent LECs' switching networks are already connected to a STP, a carrier that purchases unbundled switching from an incumbent LEC must also purchase signaling from that incumbent LEC." *Id.* Thus, the Commission concluded that "[i]n such cases, the incumbent LEC must provide access to its signaling network from that switch in the same manner in which it obtains such access itself." *Id.*

The factual predicate for the Commission's rule remains true today. The incumbent LECs' switches can connect to only one STP, and each incumbent LEC switch is already connected to that incumbent LEC's signaling network. Therefore, whenever a requesting carrier purchases unbundled switching from the incumbent, the Commission should continue to require

²³⁰ Even where CLECs deploy their own switches, access to certain ILEC databases such as the customer name database (C-NAM) and the line information database (LIDB) are necessary for CLECs to provision services.

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the incumbent LEC to provide unbundled access to the signaling network as well, “in the same manner in which [the incumbent LEC] obtains such access itself.” *Id.*²³¹

E. The Commission Should Continue To Require ILECs To Provide Unbundled Access To Operations Support Systems.

Finally, there is no question that the Commission should continue to require incumbent LECs to provide access to operations support systems (OSS) as an unbundled network element, including pre-ordering, ordering, provisioning, maintenance and repair, and billing functions. As the Commission concluded in the *UNE Remand Order* (¶ 433), “[t]he incumbents’ OSS provides access to key information that is unavailable outside the incumbents’ networks and is critical to the ability of other carriers to provide local exchange and exchange access service.” Indeed, the incumbent LEC’s OSS contains “*exclusive* information and functionalities needed to provide service (e.g., customer service record information, provisioning of orders for unbundled network element and resold services, ability to initiate repairs for unbundled network elements and resold services, etc.).” *Id.* ¶ 434 (emphasis added). As the Commission also noted, “OSS is a precondition to accessing other unbundled network elements and resold services because competitors must utilize the incumbent LEC’s OSS to order all network elements and resold services.” *Id.* Thus, the Commission correctly concluded that the very “success of local competition depends on the availability of access to the incumbent LEC’s OSS.” *Id.*; *see also Kansas-Oklahoma 271 Order* ¶ 104 (without nondiscriminatory access to OSS, a competing carrier would be “severely disadvantaged, if not precluded altogether, from fairly competing in

²³¹ In contrast, there is no apparent need for CLECs to be able to access unbundled signaling when they do not use ILEC switching. Such signaling is available from other suppliers on a regional (if not national) basis. Thus, unlike other unbundled elements, there are no local factors that otherwise limit CLECs’ ability to obtain signaling when they provide their own switches.

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the local exchange market” (quotation omitted)); *Texas 271 Order* ¶ 92. There have been no factual changes since 1999 that would call any of these conclusions into question, nor could any party seriously contend otherwise. Therefore, the Commission should retain OSS as an unbundled network element.

V. THE COMMISSION SHOULD ESTABLISH A PROCESS IN WHICH STATE REGULATORY COMMISSIONS TAKE THE LEAD IN DETERMINING WHEN ALTERNATIVES IN THEIR STATES ARE SUFFICIENTLY AVAILABLE TO WARRANT “DE-LISTING” A UNE.

The Commission seeks comment on the “proper roles of state commissions in the implementation of unbundling requirements,” and in particular, the extent to which state commissions can act in both “creating” and “removing” unbundling requirements. *Notice* ¶¶ 75-76. The Act gives the states significant authority, with respect to both the listing and the “de-listing” of UNEs. Moreover, as the Commission has elsewhere acknowledged, state commissions are generally in a better position than the Commission to assess local competitive conditions specific to a state. The state commission is also in a better position to develop the factual evidence that would be necessary to any inquiry into whether (and to what extent) a particular element should be de-listed in that state. Thus, both legal and policy considerations dictate that this Commission should work with its state counterparts and harness their expertise with respect to any determination about de-listing elements. In particular, the Commission should establish orderly procedures under which no national UNE will be de-listed in any state until the state commission has reviewed competitive progress in its jurisdiction and recommended that the Commission de-list that particular element.²³²

²³² Many of the considerations addressed here are also addressed in the recent petition of Promoting Active Competition Everywhere seeking increased involvement of the state commissions in the de-listing process. *See* Petition, *Review of the Section 251 Unbundling* (continued . . .)

A. States Have Significant Authority Over The Identification Of Network Elements To Be Unbundled.

In contrast to the initial creation of the national UNE list, Congress has given the states a substantial role to play in the de-listing of UNEs. This flows directly from the structure of the Act. The Commission has authority to establish a “national list” of available unbundled elements, but this list is only a “minimum.” *UNE Remand Order* ¶ 120. Section 251(d)(3) of the Act expressly provides that the “the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission . . . that establishes access and interconnection obligations of local exchange carriers,” as long as those obligations are consistent with the requirements of § 251. 47 U.S.C. § 251(d)(3). The Commission has recognized that § 251(d)(3) “grants state commissions the authority to impose additional obligations upon the incumbent LECs beyond those imposed by the national list, as long as they meet the requirements of section 251 and the national policy framework instituted in th[e] [UNE Remand] Order.” *UNE Remand Order* ¶ 154; 47 C.F.R. § 51.317(b)(4). Sections 261(b) and (c) also expressly reinforce that states may enact their own local competition regulations, in addition to those of the Commission, as long as they are not inconsistent with the Act. *See* 47 U.S.C. §§ 261(b), 261(c).

As these provisions make clear, the Commission’s authority with respect to adding and subtracting UNEs from the list is not entirely parallel. The Commission has sole responsibility for establishing the national “minimum” list, which has pre-emptive effect in the states.²³³ But

(. . . continued)

Obligations of Local Exchange Carriers, et al., CC Docket Nos. 01-339 *et al.* (February 6, 2002).

²³³ *See* 47 C.F.R. 51.317(b)(4) (“If an incumbent LEC is required to provide nondiscriminatory access to a network element in accordance with [the Act and the Commission’s rules], no state commission shall have authority to determine that such access is not required”).

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while the Commission may establish the “minimum” list of available UNEs, § 251(d)(3) gives the states the ultimate authority to determine whether the actual UNE list in any individual state is limited to that minimum list or also includes additional elements. Thus, even if the Commission were to remove a UNE from the national list, a state commission may preserve that UNE on its state list, either under existing federal, existing or new state law, or both. Accordingly, no UNE can be removed from the list of available UNEs in any individual state unless both this Commission and the state commission concur. In other words, while the Commission has plenary authority to *add* a UNE to the national list, the Commission and the state commissions have, in effect, concurrent authority over whether a UNE will be removed in a given state.

To recognize this fundamental difference between adding and de-listing UNEs, the Commission should establish an orderly process in which no UNE will be de-listed in any state until the state commission has concurred in the de-listing by initiating a recommendation to the Commission to de-list particular elements. Unilateral de-listing by the Commission would seriously and needlessly undermine state policies in areas in which the states retain substantial authority under both federal and state law. This issue has not yet arisen because, until now, the Commission has properly focused principally on establishing the original list of available UNEs, and it was clear that at the beginning of the Act’s implementation there were no alternatives for virtually any element.

As competition begins to develop, however, and as the Commission begins to consider the circumstances under which certain UNEs might be de-listed, the risk increases that unilateral Commission action will disrupt state policies in areas where the states have concurrent authority. This is not an idle concern. The Commission’s *Notice* seeks comment on the de-listing (or

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partial, “granular” de-listing) of numerous UNEs in ways that might lower the national “minimum” well below the level many states have determined is necessary to support competition in their jurisdictions. Indeed, many leading states are engaged in proceedings that potentially would either strongly reaffirm the current national list or even expand the list. For example, the Texas Public Utility Commission is currently conducting a proceeding in which it is considering whether to order unrestricted access to unbundled switching.²³⁴ Similarly, the New York Public Service Commission has recently issued an order establishing rates designed to make UNE-P entry in New York viable.²³⁵ And NARUC, in addition to its support of UNE-P on a national basis,²³⁶ recently issued a resolution urging the Commission “to recognize that States may continue to require additional unbundling to that required by the FCC’s national minimum.”²³⁷

²³⁴ Opinion and Order, *Petition of MCIMetro Access Transmission Services, LLC, Sage Telecom, Inc., Texas UNE platform Coalition, McLeodUSA Telecommunications Service, Inc. and AT&T Communications of Texas, L.P. for Arbitration with Southwestern Bell Telephone Company Under the Telecommunications Act of 1996*, Docket No. 24542 (Tex. PUC); see also Pennsylvania Public Service Commission, Docket Nos. P-00991648 and P-00991649 (August 26, 1999) (providing greater access to the unbundled switching element than that provided by the Commission).

²³⁵ Order on Unbundled Network Element Rates, *Proceeding on Motion of the Commission to Examine New York Telephone Company’s Rates for Unbundled Network Elements*, Case 98-C-1357 (NY PSC Jan. 28, 2002); see also Verizon-New York, Case 00-C-1945, Testimony of Charles M. Dickson, *et al.*, pp. 6-7 (Feb. 2002) (NYPSC staff testified that it had “reviewed pro-forma margin analyses [of the NYPSC’s new rates] which, in our view, now provide CLECs with an opportunity to cover their costs and to make a profit [via UNE-P], while at the same time offering customers savings and a choice of products and services”).

²³⁶ See NARUC UNE-P Resolution (adopted November 14, 2001) (“Resolved, That State commissions should support the implementation of universal availability of the UNE-P, on the basis that one form of entry should not be favored over another”).

²³⁷ See NARUC Resolution Concerning the States’ Ability to Add to the National Minimum List of Unbundled Elements (Feb. 13, 2002); see also NARUC *Ex Parte*, CC Docket No. 96-98, at 2 (continued . . .)

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It is not surprising that this would be a matter of urgent concern for many states. Several have labored for many years to create a competitive climate in which CLECs could make effective offers using UNE-P, and they are now seeing immense consumer benefits as a result. In New York, for example, AT&T has committed to keep its local rates for its unlimited local calling offer constant for a year while Verizon's rates are being substantially increased, and in the states in which UNE rates enable AT&T to provide service through UNE-P, AT&T is offering extremely attractive packages that are provoking pro-consumer competitive responses from the ILEC. States have every reason to want to preserve those benefits for their citizens.

In that regard, current state commission policies assume the availability of the UNEs on the current national list. In almost all cases, these policies were adopted in the context of lengthy proceedings on extensive and detailed factual records (much more extensive than in this Commission's prior UNE proceedings), and represent the considered judgment of the state commission concerning the baseline requirements to support competition in their jurisdictions. Any unilateral action by the Commission to de-list a UNE, without detailed and specific coordination with individual states, could undermine these state policies and needlessly require state commissions to conduct proceedings and issue orders re-establishing the state rules and policies that would be undermined by unilateral Commission action. Lack of such coordination

(... continued)

(Dec. 5, 2001) ("given the critical role played by State regulators in implementing the statutory UNE regime, as well as the intensive data- and State-specific nature of the three-year review, . . . *at a minimum*, the Commission should establish a formal mechanism to secure the State participation necessary for an informed application of the statutory 'impair' standard") (emphasis in original).

also threatens to disrupt the operation of the market, because unilateral Commission action will create substantial uncertainty, both for competitors and for the capital markets.

B. States Have The Ability And The Expertise To Assemble And Analyze More Granular Factual Records On Impairment.

Moreover, even if alternatives to incumbents' local network elements begin to materialize, they will not, and cannot be expected to, emerge uniformly and simultaneously across the country. As this Commission has recognized from its experience in § 271 applications, state commissions are in the best position to assess the local variations that will naturally occur in the availability of these alternatives.²³⁸

When the Act was first passed, the Commission correctly adopted a list of UNEs to be made available throughout the nation, because at that time all local markets were monopolies and no effective alternatives to ILEC network elements existed anywhere. But local competition will not develop evenly across the country. Rather, it will emerge gradually, in pockets, and then spread out. As a result, there will be local variation in the availability of alternatives to UNEs that a unilateral, national de-listing determination cannot adequately take into account.²³⁹

²³⁸ See, e.g., *Michigan 271 Order* ¶ 30 (“We believe that the state commissions’ knowledge of local conditions and experience in resolving factual disputes affords them a unique ability to develop a comprehensive, factual record regarding the opening of the BOCs’ local networks to competition”).

²³⁹ OS/DA – which the Commission de-listed in the *UNE Remand Order* – is a notable exception, because the Commission found adequate alternatives to the incumbent’s OS/DA were available on a *centralized* (and therefore national) basis. *UNE Remand Order* ¶ 448. The same would hold true for “stand-alone” signaling (*i.e.*, signaling in situations in which the CLEC does not also purchase unbundled switching, see *supra* Part IV(D)). These are limited exceptions, however, because other UNEs are deployed locally.

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The state commissions are in a far better position than this Commission to develop and assess evidence concerning the availability of UNE alternatives in their jurisdictions. The state commissions are already heavily engaged in the day-to-day implementation of the Commission's UNE list through their work in implementing interconnection agreements, reviewing BOC § 271 applications, and supporting consumers' interests in competition generally. In implementing these responsibilities, state commissions routinely conduct extensive evidentiary proceedings, using discovery, live testimony and cross-examination, to develop and resolve the many specific factual issues that are involved in any impairment analysis. In that role, state commissions have unique and invaluable expertise and information that should be a part of any decision on whether to de-list a UNE. *See Notice ¶ 75* (“[w]e also recognize that state commissions may be more familiar than the Commission with the characteristics of markets and incumbent carriers within their jurisdictions”).

This Commission, by contrast, simply does not have the resources to conduct an evidentiary and fact-based impairment analysis in every city and locality in the nation for every UNE, nor does it have the same level of familiarity with, or expertise in, the level of competitive choice that consumers actually enjoy in a particular locale. State commissions are far more proximate to these essential facts, and they are ultimately accountable to the citizens most affected by the local competition promised by the Act. A state commission's judgment that particular UNEs should remain available to facilitate competition in that state is thus essential to any decision on whether – and to what extent – any UNEs should be de-listed in its jurisdiction.

Nor can the Commission replicate the state commissions' extensive factual proceedings in the context of a notice and comment rulemaking. Indeed, the Commission itself seems to recognize that, although it desires a more “granular” unbundling analysis, it is not in a position to

carry out such an analysis. *See, e.g., id.* (“[a]s a result of our attempt to apply the Act’s unbundling requirements more precisely here, it is not unreasonable to expect the administrative burden on the Commission to increase”). But in the absence of coordination and cooperation with the states, the only alternative would be to rely on crude “triggers” for the de-listing of UNEs that are not a reasonable or adequate substitute for an actual impairment analysis. Use of any such “triggers” necessarily means that many UNEs would be de-listed prematurely, which obviously would significantly harm competition. *See supra* Part III. Thus, NARUC is clearly correct that states must be directly involved in any de-listing that affects their jurisdictions.

C. The Commission Should Rely On The States In The First Instance To Analyze Whether A UNE Should Be De-listed.

Accordingly, the Commission should establish an orderly, manageable process, in which no UNE will be de-listed in any state until the state commission concurs after reviewing the relevant facts in an evidentiary proceeding. There are many ways such a process could be structured. AT&T believes that the process should be guided by the following principles.

First, the Commission should identify in advance which UNEs it would be willing to consider de-listing, in order to prevent incumbent LECs from filing frivolous or overreaching petitions to de-list UNEs that are clearly not ready for elimination. The Commission could make such preliminary determinations on the basis of national evidence submitted in periodic reviews like this one. Although the record here clearly shows that none of the UNEs on the current national list (other than stand-alone signaling) is ready for such consideration now, the Commission might in a future proceeding conclude, based on the most recent evidence, that it would be willing to consider de-listing a certain UNE, perhaps under certain conditions. Thereafter, if a state commission, on the basis of record evidence developed before it, believes

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that a UNE may be ready (or conditionally ready) for de-listing, it could file a petition recommending such de-listing.

Second, the Commission should establish a streamlined and orderly process for the consideration of such state petitions to remove a UNE for an individual state.²⁴⁰ After a state commission files a de-listing petition, interested parties should have ample opportunity to comment on the evidence from that state. The de-listing procedures could be modeled, to some degree, on the procedures for considering forbearance petitions under § 10(c) – *i.e.*, the petition could be deemed granted (and the UNE de-listed in that state under the conditions established by the state commission) if the Commission does not act on the petition within a specified time, such as six months. *See* 47 U.S.C. § 160(c). An incumbent LEC would be required to continue to abide by all unbundling obligations, however, until the Commission de-lists a UNE in a state with the concurrence of the state commission. Moreover, either the state commission, this Commission, or both, should provide for a reasonable transition period before a UNE can be withdrawn at TELRIC prices.²⁴¹

Third, the Commission should also allow for the possibility of de-listing a UNE in only part of a state. Just as competition will not develop evenly across the nation, neither will it develop evenly across a state. The Commission itself could limit the scope of a petition at the

²⁴⁰ States remain authorized to remove UNEs that they added to the minimum list under federal or state law. *See* 47 C.F.R. § 51.317(b)(4).

²⁴¹ As the Commission has held, for BOCs in states where they are seeking, or have obtained, long-distance authority under § 271, all network elements identified on the “competitive checklist” must continue to be available, although not necessarily at a TELRIC price, even after they cease being part of the list established under § 251(d)(2). *See UNE Remand Order ¶¶ 468-73.*

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outset – *e.g.*, by stating that it is willing to consider de-listing a particular UNE only in the largest MSAs – or, alternatively, the state commission's petition could limit its de-listing recommendation to particular portions of the state. In either case, the UNE would be de-listed only to the extent that both the Commission and the state commission have concurred.

Fourth, there must be evidence from the state proceedings that amply addresses the factors that the Commission has deemed relevant to the impairment analysis. *See UNE Remand Order* ¶¶ 51-116; 47 C.F.R. § 51.317. In that regard, it is especially important that the evidence submitted with a state commission recommendation demonstrate that there are economical and operational alternatives to the UNE that are generally available in the relevant portion of the state, and that competitors are in fact using those alternatives in lieu of that UNE. AT&T does not attempt to propose here in detail every factor that a state should consider. At a minimum, however, no UNE should be de-listed in any state until there is evidence that there are alternatives that permit viable local entry, both in terms of cost and quality of service, and that such alternatives would permit competitors to offer service to all geographic and market segments for which the UNE would be de-listed. In many cases, these showings may depend in part on whether the incumbent has modified other processes to provide commercially acceptable performance standards on the provisioning of other UNEs (*e.g.*, as shown *supra* in Part IV(C), unbundled local switching must continue to be available until, among other things, the incumbent has demonstrated that seamless, electronic provisioning of unbundled loops is available).²⁴²

²⁴² The *Notice* asks whether the Commission should rely on the fact that an incumbent is meeting the performance standards set forth for a particular UNE as a factor in de-listing *that* UNE. *See Notice* ¶ 76. This question is a *non sequitur* and the answer is obviously no. Whether or not an incumbent is providing a UNE according to the governing performance standards has no
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There are, of course, many alternative ways in which such a process could be structured, and the states should be consulted in the course of establishing that process. But if the Commission concludes, as it suggests in the *Notice*, that a more granular approach to unbundling is warranted, its determinations must take into account the unique, “local” characteristics of these markets and the variations that will naturally exist among them, and it is imperative that the de-listing process involve substantial state participation. The only alternative would be for the Commission itself to attempt to make each of the necessary individualized determinations on a market-by-market and UNE-by-UNE basis, which it plainly lacks the resources to do.

VI. THE COMMISSION SHOULD LIMIT FUTURE UNE REVIEW PROCEEDINGS TO FOCUSED INQUIRIES CONCERNING FACTUAL CHANGES.

Finally, the Commission seeks comment on whether it should adopt procedures for the periodic review of the national UNE list. *See Notice ¶¶ 77-78.* While periodic reviews of the UNE list may be useful, such inquiries should be focused and limited to determining whether there have been changes in factual circumstances that would merit changes in the rules. In contrast, the Commission should not reopen fundamental questions relating to UNEs every time it conducts a periodic review of the UNE list. The Commission established the basic framework for determining unbundling issues in its *Local Competition* and *UNE Remand Orders*, and the Commission should adhere to that framework in subsequent reviews. A mere change in the

(... continued)

conceivable bearing on the central issue here, *i.e.*, whether competitors would be impaired without access to that UNE. Indeed, performance standards are established in order to ensure that CLECs have nondiscriminatory access to a UNE precisely because it is recognized that CLECs do not have an effective choice for that functionality. The AT&T *ex parte* letter to which the Commission refers (*see id.* n.181) contained an entirely different proposal: that switching could be de-listed if, among other things, the incumbent is meeting performance standards for provisioning *other* necessary elements, such as loops and EELs.

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composition or philosophy of the Commission should not be sufficient grounds for starting over from scratch every few years, for at least two reasons.

First, reopening every issue places an enormous burden on the parties and on the Commission. New entrants have very limited resources, and they can ill afford continuous relitigation of fundamental issues that the Commission has already decided in prior orders.

More importantly, the Commission has repeatedly recognized that new entrants desperately need regulatory *stability*, in order to raise capital, to build networks, and to pursue and sustain a business strategy. *See, e.g., UNE Remand Order* ¶ 114 (“uniform and predictable unbundling rules reduce substantially competitive LECs’ risk of underutilized investment or cash flow drain by providing financial markets with some certainty that the competitors will be able to execute their business plans”); *id.* ¶¶ 140-41, 150. The current *Notice* – which asks every conceivable UNE-related question as if the Commission were writing on a clean slate – has undermined the certainty provided in the *UNE Remand Order* about the basic rules under which competition will proceed, further hampering new entrants’ ability to formulate and implement business plans and to raise capital. Periodically throwing every issue “up for grabs” would thus retard development of the competition the Commission seeks to foster.

Several of the Commissioners have spoken eloquently about the need for the Commission to act more quickly in deciding competition-related matters in order to promote marketplace certainty. *See, e.g.,* Remarks of Chairman Powell before the Competitive Telecommunications Association, p. 2 (March 4, 2002) (“A bad decision is better than no decision, or a decision hanging in suspended animation. . . . We were urged to act and act swiftly, not just on the easy things, but on the difficult things. And so we set out to do so”). But speed in decisionmaking is of little value in promoting certainty if the most basic premises of those decisions themselves are

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constantly subject to reopening. In that case, every decision would become an interim one, and the capital markets would certainly recognize this, and act accordingly.

Therefore, if the Commission does establish periodic reviews of the UNE list, such reviews should be limited to an investigation of factual changes within the existing unbundling framework.²⁴³ In addition, the Commission should again prohibit ILECs from filing de-listing petitions in the interim, as the Commission did in the *UNE Remand Order*, see *UNE Remand Order* ¶¶ 148-52, except in conjunction with any state-by-state reviews it may authorize. See *supra* Part V. In the *UNE Remand Order*, the Commission found that “[e]ntertaining, on an *ad hoc* basis, numerous petitions to remove elements from the list, either generally or in particular circumstances, would threaten the certainty that we believe is necessary to bring rapid competition to the greatest number of customers.” *Id.* ¶ 150. Notwithstanding the Commission’s unambiguous admonition not to file de-listing petitions for three years, the incumbents improperly filed a petition to de-list “high capacity” loops and transport before the three year period was even half over, which (as the Commission predicted) increased the uncertainty surrounding the availability of those elements at a time when new entrants that depended on

²⁴³ Contrary to the suggestion of some parties, § 11 does not require the Commission to review the UNE list every two years. See *Notice* ¶ 78; 47 U.S.C. § 161. Section 11 requires the Commission to conduct a biennial review in every even-numbered year, in which it must “review all regulations issued under this Act . . . that apply to the operations or activities of any provider of telecommunications service,” and repeal or modify “any such regulation that is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.” Section 11’s terms do not preclude a Commission finding, in the context of a rulemaking, that the public interest requires that a particular rule remain in effect for a prescribed period of time, in order to provide certainty and predictability to market participants and to the capital markets. Indeed, the Commission has made such findings before. See *CALLS Order* ¶¶ 36-37 (“[t]he CALLS Proposal provides relative certainty in the marketplace during its five-year term”); *UNE Remand Order* ¶ 150. Such public interest findings would be binding in any biennial review of such rules.

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those elements were already reeling. The Commission should thus make clear that it will not entertain any further *ad hoc* petitions to de-list UNEs.

CONCLUSION

The consequences of the Commission's decision here are fundamental. Its decision will determine whether the Act succeeds or fails. Although local competition is in dire straits, the results in states where the Act is being aggressively enforced show that the Act will work when properly implemented. Thus, to carry out its commitment to "ensure that [its] regulatory framework remains current and faithful to the pro-competitive market-opening provisions of the 1996 Act" in light of actual market experience, *Notice* ¶ 1, the Commission must assure UNEs are broadly available. If it does so, AT&T and other competitors are committed to enter local markets and will pursue all available options to increase facilities-based competition. If not, then prospects for local competition, especially for mass-market customers, will evaporate.

In particular, the Commission must reject the false choice that the ILECs present. UNEs and facilities-based competition are not alternative possibilities. The two go together – and the Act thus wisely contemplates and requires that both be facilitated. Indeed, the last three decades of evolving competition in the telecommunications industry has proven that facilities-based investment and competition *evolves from* use and resale of incumbents' facilities, as the Commission itself recently reemphasized in the *UNE Remand Order*. The availability of UNEs remains essential today to *promote* facilities investment by CLECs, and it does not impede ILECs from making prudent investments either. On the other hand, restricting UNEs will also restrict CLECs' ability to invest in facilities, especially to serve smaller customers, and weakening competitors will reduce the ILECs' incentives to invest as well.

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Accordingly, the Commission should heed the call from state commissions to retain the viability of UNE-P, and should retain the network elements that are on the current national minimum list. The record provides substantial actual market evidence that without continued access to these UNEs, CLECs cannot compete in the mass market, and will have to fold their tents and cede the market to the ILEC monopolies. And the record also shows that even competition for high-volume business customers will be significantly impaired if CLECs cannot access the incumbents' loops and transport at cost-based rates. Thus, there is no factual or policy basis to alter the current list of UNEs at this time. In order to aid future reviews, however, the Commission should establish a process that allows the States to be full partners in any decision to de-list UNEs in their jurisdictions.

Actual market experience also shows that the Commission's attempts at "granularity" have failed to spur CLEC facilities investment. Rather, they have raised CLECs' costs and made it even harder for them to compete against the ILECs' enormous scale advantages. The "interim" use and co-mingling restrictions, the switching carve-out, and the current limitations on access to NGDLC architecture not only have no basis in law or logic, they have failed to generate additional facilities construction by CLECs. They have contributed instead to the under-utilization of the CLECs' existing facilities and discouraged new construction. These ill-conceived restrictions should be eliminated.

In sum, the Commission's choice is not between UNEs and facilities. It is between competition and no competition. The Commission can follow the path set by New York, where UNEs are available, and where, as a consequence, consumers are benefiting today from vigorous competition and ILECs and CLECs alike are investing in facilities. Or it can restrict access to UNEs, foreclose competition, and leave consumers the captives of stagnant monopolies. This

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should be an easy choice. Indeed, faithful implementation of the Act permits only one resolution.

Respectfully submitted,

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April 5, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 2002, I caused true and correct copies of the forgoing Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: April 5, 2002
Washington, D.C.

/s/ Peter M. Andros

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